

On the Relationship Between Market Access and National Treatment Under the GATS

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Abstract

The relationship between market access and national treatment under the GATS is a loophole left by the drafters of the agreement. Before 2010, the issue was valuable only in theory, but since the WTO case of China–Electronic Payment Services, the issue has become a pressing one, and its value in practice has been closely concerned. This paper analyzes the issue based on GATS Articles XVI, XVII, XX:2, and two Scheduling Guidelines. It also compares the different approaches to resolve the issue. After reviewing the Panel Report of China–Electronic Payment Services, the author argues that a simple, arbitrary approach (mutually exclusive or scheduling primacy) is not persuasive. The essence of the relationship between market access and national treatment is how far a WTO Member can go under or beyond its current service schedule, and how to clarify the issue is more a choice of conservatism or liberalism than a technical one.

Introduction

One of the characteristics of national treatment under the General Agreement on Trade in Services (GATS) is its complicated relationship with market access. The clear demarcation between market access and national treatment with respect to trade in goods seems to blur in trade in services. The ambiguity was noted even before the conclusion of the GATS. During the Uruguay Round of negotiations, the representative of Australia stated, when discussing trade in services, that “the concepts of market access and national treatment seemed to merge” and “[i]f reservations were allowed on both market access and national treatment, drawing the line between the market access conditions and national

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treatment conditions might be difficult.”¹ Indeed, market access and national treatment in trade in services cannot be separated through tariffs and other border measures. Therefore, it is essential to clarify the relationship between market access and national treatment under the GATS.

I. Market Access Under the GATS

The market access obligation is clearly identified by the GATS, though it cannot be found in the General Agreement on Tariffs and Trade (GATT).² It is set forth in Article XVI of the GATS. The provision reads as follows:

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less [favorable] than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
 - (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
 - (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
 - (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
 - (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
 - (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
 - (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.³

GATS Article XVI:1 obliges a Member to accord market access treatment based on its service schedule. GATS Article XVI:2 gives a list of limitation measures on market access that a Member should not take unless otherwise specified in its service schedule. From the structure of the GATS, market access and national treatment are in the same part, i.e.

1. Working Group on Financial Services Including Insurance, *Note on the Meeting of 11-13 June 1990*, ¶ 52, MTN.GNS/FIN/1 (July 5, 1990) [hereinafter *Note on the Meeting of 11-13 June 1990*].

2. Bernard Hoekman, *Assessing the General Agreement on Trade in Services*, in *THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES* 88, 93 (Will Martin & L. Alan Winters, eds. 1996).

3. General Agreement on Trade in Services art. XVI, Apr. 14, 1994, 1869 U.N.T.S. 183 (entered into force Jan. 1, 1995) [hereinafter GATS].

Part III (Specific Commitments), which means that market access is not a general obligation under the GATS.

II. National Treatment under the GATS

Structurally, the national treatment article is placed in Part III (Specific Commitments) of the main text of the GATS, that is, GATS Article XVII. It indicates that national treatment under the GATS is different from most-favoured-nation (MFN) treatment and transparency, which are placed in Part II of the GATS as general obligations and principles.

A. GATS ARTICLE XVII:1

Paragraph 1 of GATS Article XVII reads:

In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less [favorable] than that it accords to its own like services and service suppliers.⁴

Paragraph 1 of GATS Article XVII is the key rule of national treatment in service trade. The purpose of this paragraph is to prohibit discrimination against foreign services and service suppliers to the advantage of like services and service suppliers of national origin.⁵ First, the scope of national treatment is limited in the sectors inscribed in each Member's service schedule. This means national treatment is inapplicable to the service sectors not covered by a Member's service schedule, so one Member of the WTO may take discriminatory measures against services and service suppliers of any other Member in those reserved sectors without violation of the national treatment rule embodied in GATS Article XVII. This reservation on national treatment came from the Uruguay Round negotiations on trade in services, particularly from the insistence of developing countries. In this regard, Peru's view could be the representative view of developing countries: "national treatment could be interpreted as an objective to be attained in the short, medium and long-term, sector by sector, activity by activity, depending on the coverage and the commitments deriving from the final framework agreement."⁶ Mexico held the same view.⁷ This "bottom-up" approach provides more flexibility for Members, especially developing countries, to protect specific domestic services and service suppliers.

Secondly, even for those sectors inscribed in each Member's service schedule, national treatment is not necessarily or fully applicable because national treatment may be limited through "any conditions and qualifications" set out in the Member's service schedule.⁸

4. *Id.* art. XVII.

5. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, ¶ 7.302, WT/DS27/R/ECU (May 22, 1997) [hereinafter *EC—Bananas III* (Panel)].

6. Group of Negotiations on Services, *Note on the Meeting of 17-21 July 1989*, ¶ 205, MTN.GNS/24 (Aug. 28, 1989).

7. *Id.* ¶ 202.

8. GATS art. XXVII.

Thirdly, the beneficiaries of national treatment are both *services* and *service suppliers*. "Service" is defined by GATS Article I(3)(b): "services includes any service in any sector except services supplied in the exercise of government authority."⁹ "Service supplier" means any *person* that supplies a service,¹⁰ while "person" is a legal term that is defined as either a natural person or a juridical person.¹¹ Moreover, branches and representative offices of service suppliers can also be accorded national treatment.¹²

Fourthly, the measures relating to national treatment are "all measures affecting the supply of services."¹³ "Measure" constitutes any measure by a Member that is in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.¹⁴ "Supply of services" can be defined by the definition of "supply of a service," which includes the production, distribution, marketing, sale, and delivery of a service.¹⁵

Fifthly, the comparable domestic counterparts of beneficiaries of national treatment are a Member's own "like services and service suppliers."¹⁶ But the GATS does not provide any clear standard of likeness between services and service suppliers of one Member and those of another. In a note by the WTO Secretariat, it seems that "likeness" in the national treatment context depends "in principle on attributes of the product or supplier *per se* rather than on the means by which the product is delivered."¹⁷ Some argue that like services and services suppliers cover "directly competitive or substitutable" services and services suppliers.¹⁸ It is also difficult to understand the relationships between like services and like service suppliers. In *EC-Bananas III*, the panel's view is "to the extent that entities provide these like services, they are like service suppliers."¹⁹ This view almost equates services and service suppliers, so it was criticized as "an exceedingly broad notion."²⁰ In fact, "like services and service suppliers" is not a pure legal issue, but an issue mixed with both rules and facts. In *Canada-Certain Measures Concerning Periodicals*, the appellate body stated that the determination of whether imported and domestic products

9. *Id.* art I:3(c) (stating that "'a service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers").

10. *Id.* art. XXVIII(g).

11. *Id.* art. XXVIII(j).

12. *Id.* at XXVIII(g) n.12 ("Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (*i.e.* the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied."). For the history of this interpretative note, see GATT Secretariat, *Statute of Branches as Service Suppliers*, MTN.GNS/W/176 (Oct. 29, 1993).

13. GATS art. XVII.

14. *Id.* art. XXVIII(a).

15. *Id.* art. XXVIII(b).

16. *Id.* art. XVII.

17. WTO Secretariat, *The Work Programme on Electronic Commerce*, ¶ 33, S/C/W/68 (Nov. 16, 1998).

18. Patros C. Mavroidis, *Like Products: Some Thoughts at the Positive and Normative Level*, in *REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW* 125, 126-27 (Thomas Cottier & Petros C. Mavroidis eds. 2000).

19. *EC-Bananas III* (Panel), *supra* note 5, ¶ 7.322.

20. Werner Zdouc, *WTO Dispute Settlement Practice Relating to the GATS*, 2 J. INT'L ECON. L. 295, 332-33 (1999).

are “like products” is a process by which legal rules have to be applied to facts.²¹ If this conclusion is also applicable to the GATS then the “likeness” issue in the GATS must be construed on a case-by-case basis.

B. GATS ARTICLE XVII:2

Paragraph 2 of GATS Article XVII reads:

“A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment so that it accords to its own like services and service suppliers.”²²

The text of paragraph 2 of GATS Article XVII is modeled on a GATT Panel Report concerning Article III of the GATT 1947.²³ In *United States—Section 337 of the Tariff Act of 1930*,²⁴ the panel used the wording “formally identical.”²⁵ It is generally recognized that GATT Article III:4 covers both de jure and de facto inconsistency.²⁶ This is also the case for GATS Article XVII. Paragraph 2 of GATS Article XVII, in fact, incorporates de jure and de facto discrimination because the notion of “treatment no less [favorable]” has been interpreted under paragraph 2 of GATS Article XVII to include both “formally identical treatment” and “formally different treatment.”²⁷

In the beginning of the Uruguay Round negotiations, there were three options for national treatment. The first option was the traditional definition of national treatment that tended to be de jure, supported by Japan and Korea.²⁸ The second option was the equality of competitive opportunities, supported by the European Communities, Switzerland, Canada, and the United States.²⁹ The third option was the equivalent treatment.³⁰ In the end, the second option was accepted—that is, national treatment should go beyond de jure discrimination and guarantee equality of competitive opportunities.

De jure discrimination can easily be identified by comparing the treatment of domestic and foreign services or service suppliers. But it is difficult to determine de facto discrimi-

21. Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, at 22, WT/DS31/AB/R (adopted Jul. 30, 1997).

22. GATS art. XVII:2.

23. Zdouc, *supra* note 20, at 335; see also Aaditya Mattoo, *National Treatment in the GATS, Corner-stone or Pandora's Box?*, 31 J. WORLD TRADE 107, 123 (1997).

24. Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.11, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345, 362 (1990).

25. *Id.* The panel further stated that the wording “treatment no less [favorable]” in paragraph four of GATT Article III calls for “effective equality of opportunities for imported products” and that application of formally identical legal provisions would in practice accord less favorable treatment to imported products, or application of different legal treatment to imported products may in fact be no less favorable. *Id.*

26. *Id.*

27. See *EC—Banana III* (Panel), *supra* note 5, ¶ 7.301 (arguing that paragraphs two and three of GATS Article XVII do not impose new obligations on WTO Members additional to those contained in paragraph one).

28. Note on the Meeting of 11-13 June 1990, *supra* note 1, ¶ 44.

29. *Id.* ¶¶ 44-45, 57, 59; see also Working Group on Financial Services Including Insurance, Note on the Meeting of 12-13 July 1990, ¶¶ 18, 33, 58, MTN.GNS/FIN/2 (Aug. 10, 1990).

30. Note on the Meeting of 11-13 June 1990, *supra* note 1, ¶ 44.

nation. According to paragraph 2 of GATS Article XVII, formally identical treatment might result in less favorable treatment—that is, *de facto* discrimination—whereas formally different treatment can result in no less favorable treatment.³¹ Therefore, there are four possible permutations:

- (a) Formally identical treatment results in no less favorable treatment;
- (b) Formally identical treatment results in less favorable treatment;
- (c) Formally different treatment results in no less favorable treatment; or
- (d) Formally different treatment results in less favorable treatment.

In the four permutations, (a) and (c) are compatible with national treatment obligations of GATS, while (b) and (d) run counter to national treatment obligations. With respect to (b), it seems that when a complaining party, which is usually a foreign country claiming its services or services suppliers are discriminated against by a host country, should have the burden of proof to show that formally identical treatment results in less favorable treatment. On the other hand, with respect to (d), formally different treatment itself may constitute *prima facie* evidence that the disputed measure is inconsistent with national treatment obligations. It is the defendant party's burden to prove that formally different treatment results in no less favorable treatment, which is also the view of the GATT Panel in *United States—Section 337 of the Tariff Act of 1930*.³²

C. GATS ARTICLE XVII:3

Paragraph 3 of GATS Article XVII reads:

"Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member."³³

Paragraph 3 of GATS Article XVII goes further and provides a criterion to determine what measures will accord less favorable treatment to foreign services or service suppliers. The criterion is whether the formally identical or formally different treatment "modifies the conditions of competition in [favor] of services or service suppliers of the Member compared to like services or service suppliers of any other Member."³⁴ The wording of paragraph 3 of GATS Article XVII also originated from GATT cases.³⁵ Some scholars even consider that GATS Article XVII:3 "is inspired by the GATT case law."³⁶ In the

31. GATS art. XVII:2.

32. *United States—Section 337*, *supra* note 24, ¶ 5.11.

33. GATS art. XVII:3.

34. *Id.* It is worth noting that NAFTA also uses a similar standard, i.e., "equal competitive opportunities," to determine whether the treatment is less favorable in financial services. See North American Free Trade Agreement, U.S.-Can.-Mex., art. 1405(5), Dec. 17, 1992, 32 I.L.M. 289 (1993) ("A Party's treatment of financial institutions and cross-border financial service providers of another Party, whether different or identical to that accorded to its own institutions or providers in like circumstances, is consistent with paragraphs 1 through 3 if the treatment affords *equal competitive opportunities*." (emphasis added)).

35. MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION, LAW, PRACTICE, AND POLICY* 248 (2003).

36. *Id.*

case of *Italian Discrimination Against Imported Agricultural Machinery*,³⁷ the panel for the first time used the wording "modify the conditions of competition."³⁸ But the notion of "modification of the conditions of competition" is as vague as the notion of "like services and service suppliers," all of which can be the focus of disputes in the cases relating to the GATS under the WTO dispute settlement mechanism.³⁹ Actually, the new concept of "modification of conditions of competition" or its predecessor "equality of competitive opportunities" was intentionally left for the dispute settlement mechanism to interpret.⁴⁰

III. Position of Market Access and National Treatment in a Service Schedule

Because both market access and national treatment obligations are subject to the specific commitments of a WTO Member, it is necessary to study the general structure of the Schedule of Specific Commitments on Services. The following table shows the general structure of a service schedule.

Table 1: General Structure of a Service Schedule in the GATS/ WTO⁴¹

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
	(1)	(1)	
	(2)	(2)	
	(3)	(3)	
	(4)	(4)	

Note: (1)(2)(3)(4) refer to four modes of supply, i.e., cross-border supply, consumption abroad, commercial presence, and presence of natural persons.

From Table 1, it is clear that there are four columns in each Member's service schedule: (1) sector column, (2) market access column, (3) national treatment column, and (4) additional commitments column.⁴² On the one hand, any sector or sub-sector that a Member agrees to open shall be inscribed in the sector column; or, to put it another way, if a sector

37. Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, ¶ 12, L/833 (Oct. 23, 1958), GATT B.I.S.D. (7th Supp.) at 60, 63 (1959).

38. *Id.* (stating that the drafters of GATT Article III "intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products") (emphasis added).

39. See Robert E. Hudec, *GATT/WTO Constraints on National Regulations: Requiem for an "Aim and Effects" Test*, 32 INT'L LAW. 619, 649 (1998) (arguing that the text of GATS Article XVII(3) introduces an economic analysis of the competitive impact of the regulation in question).

40. Note on the Meeting of 11-13 June 1990, *supra* note 1, ¶ 59.

41. Trade in Services, *Guidelines for the Scheduling of Specific Commitments Under The General Agreement on Trade In Services (GATS)*, Annex 1, S/L/92 (Mar. 28, 2001) [hereinafter 2001 Scheduling Guidelines].

42. *Id.* (the "Additional Commitments" column neither belong to, nor overlap with, either the "Market Access" or "National Treatment" columns); see also GATS art. XVIII ("Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.") (emphasis added).

or sub-sector does not appear in the Schedule, it will be presumed that the Member has not promised to open the sector or sub-sector. This is the so-called positive or bottom-up approach.⁴³ On the other hand, the limitations on market access and national treatment with respect to a specific sector or sub-sector should be inscribed in corresponding columns, in addition to the horizontal commitments applying to trade in services in all scheduled service sectors.⁴⁴ Otherwise, it will be deemed that there is no limitation on market access or national treatment for the sector or sub-sector. This is the so-called negative or top-down approach.⁴⁵ A schedule is the combination of the positive approach and the negative approach, i.e., a hybrid approach.⁴⁶ Furthermore, for each sector or sub-sector, the limitation shall be expressed in order of four modes of supply, i.e., cross-border supply, consumption abroad, commercial presence, and presence of natural persons.⁴⁷

From the table, it seems that market access column and national treatment column are separate and independent from each other. In fact, the two columns are connected and intertwined according to paragraph 2 of Article XX of the GATS.

IV. GATS Article XX:2

A. FOUR POSSIBILITIES

Paragraph 2 of GATS Article XX provides: “[M]easures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.”⁴⁸ This means that, at least sometimes, some limitation measures inscribed in the market access column are also limitation measures in the national treatment column.⁴⁹ The reason for the overlap is that “market access restrictions in the form of limitations or conditions on modes of supply are likely to violate national treatment for these modes as well.”⁵⁰ But the GATS does not state which measures or what kinds of measures entered in the market access column are also regarded as limitation measures in the national treatment column. Logically, there are four possibilities:

43. See Working Group on the Relationship Between Trade and Investment, *Note by the Secretariat: Non-Discrimination Most-Favoured-Nation Treatment and National Treatment*, ¶ 8, WT/WGTI/W/118 (June 4, 2002).

44. GATS art. XX:1.

45. *Non-Discrimination*, *supra* note 43, ¶ 8.

46. This hybrid approach, especially the positive approach for service sectors and sub-sectors, has been criticized by some scholars as one of the weaknesses of the GATS. See, e.g., Dilip K. Das, *Trade in Financial Services and the Role of the GATS: Against the Backdrop of the Asian Financial Crises*, 32 J. WORLD TRADE 100 (1998); Pierre Sauvé, *Assessing the General Agreement on Trade in Services, Half-Full or Half-Empty?*, 29 J. WORLD TRADE 125 (1995).

47. The four modes of supply are from the definition of “trade in services,” which for the purpose of the GATS are: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” GATS art. I:2.

48. See GATS art. XX:2.

49. See *id.*

50. H.E. Haralambides, M. Westeneng & S. Zou, *GATT and Its Effect on Shipping and Ports* (KMI/IAME Conf. on Int'l Trade Relations & World Shipping, Seoul, S. Kor., June 8-10, 1994), http://www.maritimeeconomics.com/sites/maritimeeconomics.com/files/downloads/papers/HH_GATT%20Seoul.pdf.

- (1) While there is no limitation in the national treatment column, there may be some limitations on national treatment inscribed in the market access column;⁵¹
- (2) While there are some limitations entered in the national treatment column, there may be more limitations on national treatment inscribed in the market access column;
- (3) While there are some limitations in the national treatment column, there is no more limitation on national treatment in the market access column;
- (4) While there is no limitation in the national treatment column, there is no limitation on national treatment in the market access column. In this case, there is not any limitation on national treatment in either column.

Of the four possibilities, the last one is the simplest and poses no problem because it provides the openness and liberalization of the service sector to the greatest extent. All problems originate from the other possibilities. To address the overlap issue, it is necessary to first answer two preliminary questions.

B. TWO PRELIMINARY QUESTIONS

The first preliminary question is how many possible limitation measures may exist in the market access column. Based on paragraph 2 of GATS Article XVI, a Member may list as many as six types of limitation measures in its market access column, including:

- (1) limitations on the number of service suppliers;
- (2) limitations on the total value of service transactions or assets;
- (3) limitations on the total number of service operations or the quantity of service output;
- (4) limitations on the total number of natural persons;
- (5) limitations on the types of legal entity or joint venture;
- (6) limitations on the maximum percentage of foreign shareholding or the total value of foreign investment.⁵²

Among the six types of limitation measures, the first four concern quantitative limitations on market access, the fifth concerns legal entity or joint venture limitations, and the sixth covers foreign capital limitations.⁵³ According to a statement in the 2001 Scheduling Guidelines, the list is exhaustive.⁵⁴ There is a similar statement in the Guidelines for the Scheduling of Initial Commitments in Trade in Services circulated during the Uruguay

51. The WTO noted this possibility in 2010: "[T]he entry 'none' in the national treatment column may not necessarily be taken to mean a full commitment to national treatment in cases where market access limitations also constitute limitations on national treatment. This makes it more difficult to assess the degree of commitment to national treatment." Council for Trade in Services, *Financial Services, Background Note by the Secretariat*, at 38 n.110, S/C/W/312 (Feb. 3, 2010).

52. GATS art. XVI:2; 2001 *Scheduling Guidelines*, *supra* note 41, ¶ 12(a)-(f).

53. GATS art. XVI:2; see also Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 214-65, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *United States—Gambling*] (further discussion of GATS Article XVI).

54. 2001 *Scheduling Guidelines*, *supra* note 41, ¶¶ 8, 23. In Hoekman's view, the exhaustive list weakens the scope of market access obligation because it does not cover other measures that have similar effects like the six kinds of measures. See Hoekman, *supra* note 2, at 112.

Round of negotiations.⁵⁵ Usually a Member only inscribes some of the six types of limitation measures in its market access column.

The second preliminary question is how many possible limitation measures there are in the national treatment column. Contrary to Article XVI, GATS Article XVII does not make an exhaustive list of limitation measures on national treatment.⁵⁶ This fact adds to the difficulty in distinguishing market access and national treatment limitation measures. GATS Article XVII:1 uses the wording "all measures affecting the supply of services."⁵⁷ There is no limitation on the scope of "all measures."⁵⁸ Moreover, paragraph 1 of GATS Article XX is of little help to elucidate paragraph 2 of because paragraph 1 uses the words "terms, limitations and conditions" for market access, and the words "conditions and qualifications" for national treatment.⁵⁹ What is the difference between "terms, limitations and conditions" and "conditions and qualifications?" There is no clear answer from the text of the GATS.

V. Scope of GATS National Treatment

Why is it so important to precisely set out the domains of national treatment limitation measures under GATS Article XVII? The answer is because it is directly related to the scope of GATS national treatment. Only after finding the complete limitations measures on national treatment is it then possible to determine the real domains of national treatment obligations under the GATS. Otherwise, national treatment obligations, as well as GATS Article XVII, would be uncertain and unpredictable.

A. 2001 SCHEDULING GUIDELINES

The 2001 Scheduling Guidelines should not be considered as a legal interpretation of the GATS.⁶⁰ In *Mexico—Measures Affecting Telecommunications Services*,⁶¹ the panel found that "the source, content, and use by negotiators of the Explanatory Note, together with its later adoption by Members as the Scheduling Guidelines, provides an important element with which to interpret the provisions of the GATS."⁶² It seems the panel overestimated the legal status of the Scheduling Guidelines. In *United States—Gambling*, the panel found that the 1993 Scheduling Guidelines could be used as the context of GATS service

55. Group on Negotiations Services, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, ¶ 4, MTN.GNS/W/164 (Sept. 3, 1993) [hereinafter *1993 Scheduling Guidelines*].

56. GATS arts. XVI:2, XVII:1; Council for Trade in Services, *Report by the Chairman of the Committee of Specific Commitments: Consideration of Issues Relating to Article XX:2 of the GATS*, Annex I ¶ 3, S/C/W/237 (Mar. 24, 2004). The Secretariat of the WTO prepared an illustrative list of national treatment restrictions, reported in document Job No. 3086, but many delegations empathized that the list "was understood to be of a purely illustrative nature." See Committee on Special Commitments, *Note by the Secretariat: Report of the Meeting Held on 23 and 24 May 2000*, ¶¶ 4, 13-14, S/CSC/M/15 (June 29, 2000).

57. GATS art. XVII:1.

58. See *id.*

59. GATS art. XX:1(a)-(b).

60. *2001 Scheduling Guidelines*, *supra* note 41, ¶ 23.

61. Panel Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004).

62. *Id.* ¶ 7.43.

schedules “within the meaning of Article 31 of the Vienna Convention,”⁶³ but this finding was overruled.⁶⁴ The appellate body found that the 1993 Scheduling Guidelines was drafted by the GATT Secretariat rather than the parties to the negotiations, so it could not constitute “an agreement relating to the treaty” and could not be accepted “as an instrument related to the treaty.”⁶⁵ Thus, the appellate body was of the view that the 1993 Scheduling Guidelines could not be regarded as the context for interpreting GATS service schedules.⁶⁶ Certainly, the appellate body’s understanding of the legal status of the 1993 Scheduling Guidelines likewise applies to the 2001 Scheduling Guidelines. Moreover, the appellate body also found that the 2001 Scheduling Guidelines could not constitute “subsequent practice” within the meaning of Article 31(3)(b) of the Vienna Convention.⁶⁷

In spite of the limitation on the legal status of the 2001 Scheduling Guidelines, it cannot be denied that the 2001 Scheduling Guidelines is helpful in understanding GATS service schedules. In *United States—Gambling*, although the appellate body did not consider the 1993 Scheduling Guidelines as “context” or “subsequent practice” in interpreting GATS service schedules, it did recognize that the 1993 Scheduling Guidelines could be “preparatory work of the treaty”⁶⁸ and also used as supplemental means of interpretation identified in Article 32 of the Vienna Convention.⁶⁹ For the same reason, the 2001 Scheduling Guidelines can also be used as supplemental means of interpretation for GATS service schedules.

The 2001 Scheduling Guidelines provide: “[I]n accordance with Article XX:2, any discriminatory measure scheduled in the market access column is also to be regarded as scheduled under Article XVII and subject to the provisions of that Article.”⁷⁰ This sentence is almost the same as that of the 1993 Scheduling Guidelines.⁷¹ The word “any” implies that all six limitation measures listed in Article XVI:2 may be regarded as national treatment limitation measures, provided that they are discriminatory. If a measure scheduled in the market access column is non-discriminatory, then it is only a pure market access limitation measure, without any relationship to national treatment.

In comparison with the 1993 Scheduling Guidelines, the 2001 Scheduling Guidelines offers a piece of advice: When measures inconsistent with both GATS Articles XVI and XVII are inscribed in the column relating to Article XVI, Members could indicate that this is the case for national treatment—for instance, by adding the words “also limits national treatment” to the market access column.⁷² But the effect of this advice is restrained by the fact that the 2001 Scheduling Guidelines applies only to the service schedules after the adoption of the 2001 Scheduling Guidelines, and the service schedules

63. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.82, WT/DS285/R (Nov. 10, 2004).

64. *United States—Gambling*, *supra* note 53, ¶¶ 175, 178.

65. *Id.* ¶ 175.

66. *Id.* ¶ 178.

67. *Id.* ¶ 193.

68. *Id.* ¶ 196.

69. *Id.* ¶ 197.

70. 2001 *Scheduling Guidelines*, *supra* note 41, ¶ 18.

71. 1993 *Scheduling Guidelines*, *supra* note 55, ¶ 11 (“[I]n accordance with the footnotes to Article XVI:2 and Article XX:2, any discriminatory measure scheduled in the market access column is also to be regarded as scheduled under Article XVII and subject to the provisions of that Article.”).

72. 2001 *Scheduling Guidelines*, *supra* note 41, ¶ 18.

before the adoption of the 2001 Scheduling Guidelines should be understood to have been drafted based on the 1993 Scheduling Guidelines.⁷³ Consequently, the 2001 Scheduling Guidelines has no retroactive effect, so the issue of overlap between GATS Articles XVI and XVII still remains, especially for those pre-2001 schedules. And even for post-2001 schedules, if some Members fail to indicate the above magic words in the market access column, the overlap issue still remains.⁷⁴

B. PRE-ENTRY AND POST-ENTRY MEASURES

The overlap issue between market access and national treatment can also be described as an issue of relating to pre-entry and post-entry. If a Member takes a pre-entry measure not inscribed in either the market access column or the national treatment column but affecting the supply of services, is it in violation of national treatment obligations under GATS Article XVII? In other words, are GATS national treatment obligations binding on post-entry measures only, or on both post-entry and pre-entry measures?

In this connection, the GATT national treatment and its long-term practice provide no clue. According to GATT Article III:1, national treatment obligations are on "*internal* taxes, and other *internal* charges, and laws, regulations and requirements affecting the *internal* sale, offering for sale, purchase, transportation, distribution or use of products, and *internal* quantitative regulations requiring the mixture, processing or use of products."⁷⁵ Therefore, limitation measures on national treatment in the context of the GATT are all post-entry measures. The pre-entry measures are mainly subject to GATT Article II (Schedules of Concessions) and Article XI (General Elimination of Quantitative Restrictions).⁷⁶ There is no overlap between GATT Article III and GATT Articles II or XI. They are separated by a pre-entry or a post-entry standard. Only after crossing the border of a Member can a product be entitled to national treatment. Therefore, the GATT experience cannot provide a clue to the overlap issue between market access limitations and national treatment limitations under the GATS.

GATS Article XVII:1 states: "[E]ach Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less [favorable] than that it accords to its own like services and service suppliers."⁷⁷ From the text of GATS Article XVII:1, it is unclear whether "all measures" includes pre-entry and post-entry measures or just post-entry measures. The key to determining the scope of GATS national treatment is to interpret the ordinary meaning of "all measures affecting the supply of services."

In *EC-Bananas III*, the panel pointed out:

[T]he drafters [of the GATS] consciously adopted the terms 'affecting' and 'supply of a service' to ensure that the disciplines of the GATS would cover any measure bearing

73. *Id.* at 3 n.1.

74. It is noteworthy that the 2001 *Scheduling Guidelines* is not an inherent part of the WTO Agreement; therefore, it is not legally binding on WTO Members.

75. General Agreement of Tariffs and Trade, art. 3, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

76. Mattoo, *supra* note 23, at 112.

77. GATS art. XVII.

upon conditions of competition in supply of a service, regardless of whether the measure directly govern or indirectly affects the supply of the service.⁷⁸

The appellate body in the case supported the panel's opinion and further held:

In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous Panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing."⁷⁹

In addition, the appellate body also agreed with the panel on the point that GATS Article XXVIII(c) does not "narrow the meaning of the term 'affecting' to 'in respect of.'"⁸⁰ In *Canada—Certain Measures Affecting the Automotive Industry*, the panel reiterated that GATS Article I "does not *a priori* exclude any measure from the scope of application" of the GATS.⁸¹

Summing up, the above cases about the scope of "measures" in the GATS are all in support of a conclusion that the notion of "measures" in the GATS is not a narrow one, but a broad one.⁸² Therefore, the ordinary meaning of Article XVII, "all measures affecting the supply of services" could include any measure that may affect the supply of ser-

78. EC—*Bananas III* (Panel), *supra* note 5, ¶ 7.281 (emphasis added).

79. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 220, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter EC—*Bananas III* (Appellate)].

80. *Id.* at 220. See also GATS art. XXVIII(c) ("For the purpose of this Agreement: 'measures by Members affecting trade in services' include measures in respect of (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.").

81. Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 10.234, WT/DS139/R (Feb. 11, 2000). The panel further stated:

The determination of whether a measure affects trade in services cannot be done in abstract terms in isolation from examining whether the effect of such a measure is consistent with the Member's obligations and commitments under the GATS. In this case, the determination of whether . . . measures affecting trade in services within the meaning of Article I of the GATS should be done *on the basis of the determination of whether these measures constitute less [favorable] treatment* for the services and service suppliers of . . . other Members as compared to domestic ones (Article XVII).

Id. (emphasis added). But this interpretation was overruled by the appellate body. Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 151, WT/DS139/AB/R (May 31, 2000). The appellate body stated:

The fundamental structure and logic of Article I:1, in relation to the rest of the GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made *before* the consistency of that measure with any substantive obligation of the GATS can be assessed.

Id. In the Appellate Body's view, the panel erred in its interpretation approach at this point. In my opinion, the appellate body is correct because whether a measure is within the scope of the GATS should be decided before determining whether a measure is inconsistent with the obligation of the GATS. Approaching from the opposite direction is like putting the cart before the horse.

82. In accordance with the Vienna Convention, WTO practice, by way of WTO dispute settlement mechanisms, could be the resource of interpretation of the WTO agreements. See Vienna Convention on the Law of Treaties, art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 (stating that treaty interpretation shall take into

vices, no matter how or when the service is supplied. Moreover, as acknowledged by the WTO Committee on Specific Commitments, in the six exhaustive categories of market access limitations, there are some restrictions with post-entry effect, such as GATS Articles XVI:2(b) ("limitations on the total value of service transactions or asset") and XVI:2(c) ("limitations on the total number of service operations or the quantity of service output").⁸³ Thus, national treatment obligations under the GATS could be binding on both pre-entry and post-entry measures. The extension of national treatment from post-entry to pre-entry is regarded as a "revolution" by many countries.⁸⁴

One argument against the broad national treatment obligations is that it would reduce the meaning or effect of GATS Article XVI and make it "address primarily non-discriminatory market access restrictions."⁸⁵ Actually, a broad national treatment interpretation is not incompatible with discriminatory market access restrictions. If market access restrictions can be divided into "discriminatory" and "non-discriminatory" measures, then the discriminatory measures are national treatment limitations as well as market access limitations. It is possible that some market access measures are discriminatory by their nature—for example, limitations on the participation of foreign capital—but it does not mean that they are not in violation of market access obligations just because they are in violation of national treatment obligations under GATS Article XVII. The presumption of GATS Article XX:2 is that a limitation measure may be inconsistent with both Articles XVI and XVII; it does not mean that if a limitation measure is inconsistent with Article XVII it will not fall under Article XVI as well. Indeed, a broad national treatment interpretation could increase the applicable scope of Article XVII, but at the same time, it does not decrease the scope of Article XVI. If a Member's measure is not inconsistent with both market access commitments and national treatment commitments, another Member may complain against it based on both Articles XVII and XVI.

VI. Two Extreme Examples: Unbound/None or None/Unbound

A. DEBATE ON THE ISSUE OF UNBOUND/NONE OR NONE/UNBOUND

The relationship of GATS Articles XVI and XVII, together with Article XX:2, is especially unclear under two extreme circumstances. The first circumstance is an "Unbound" entry in the market access column, with a "None" entry in the national treatment column. The second circumstance is a "None" entry in the market access column and an "Unbound" entry in the national treatment column. In fact, the two circumstances are two sides of the same coin. This analysis will only focus on the first example for the purpose of convenience and conciseness. If the first issue were resolved, then the second issue would also be readily solved. Thus, the two questions can be simplified into the following one: If a Member entered "Unbound" in the market access column and "None" in the national

account "any subsequent practice in the application of the treaty which establishes the agreement of the parties").

83. Committee on Specific Commitments, *Note by the Secretariat: Revision of Scheduling Guidelines*, ¶ 15, S/CSC/W/19 (Mar. 5, 1999).

84. United Nations Conference on Trade and Development, Geneva, Switz., May 1999, *National Treatment*, at 4, U.N. Doc. UNCTAD/TTE/ITT/11 (Vol. IV).

85. Mattoo, *supra* note 23, at 116.

treatment column, could the Member maintain any discriminatory measure of market access? In other words, if there is a conflict between a market access limitation and a national treatment requirement, which one shall prevail? Should "Unbound" override "none," or should "None" override "Unbound?" This question has been highly debated in the meetings of the Council for Trade in Services.⁸⁶

In one view, if a Member enters "Unbound" in the market access column, then the Member has the right to introduce any market access limitations, discriminatory or non-discriminatory, although there is a "None" entry in the national treatment column.⁸⁷ Based on this view, "Unbound" overrides "None." The representative country holding this view is Brazil.⁸⁸

On the contrary, according to another view, "Unbound" under the market access column and "None" under the national treatment column mean that the Member could not introduce any discriminatory measure falling under Article XVI.⁸⁹ Based on this view, "None" overrides "Unbound." Switzerland prefers this view.⁹⁰

To address the issue of conflict between "Unbound" and "None," it is necessary to first determine whether GATS Article XX:2 applies to such a situation.⁹¹ Switzerland used the literal reading method, arguing that "Unbound" in a service schedule "neither constituted an "inscribed measure, nor a condition or qualification,"⁹² so this issue could not be resolved through GATS Article XX:2. This non-application of Article XX:2 to the "Unbound"/"None" situation was also supported by Australia and the European Communities.⁹³ Brazil also agreed that Article XX:2 did not apply to the situation but it pointed out that the non-application of XX:2 itself could not resolve the "Unbound"/"None" issue.⁹⁴

B. APPROACHES TO ADDRESS THE OVERLAP ISSUE

There are several approaches to address the overlap issue.

86. Council for Trade in Services, *Note by the Secretariat: Report of the Meeting Held on 5 June 2002*, ¶ 19, S/C/M/60 (July 10, 2002); see also Council for Trade in Services, *Note by the Secretariat: Report of the Meeting Held on 17 July 2002*, ¶ 8, S/C/M/61 (Sept. 23, 2002); Council for Trade in Services, *Note by the Secretariat: Report of the Meeting Held on 25 October 2002*, ¶¶ 85-94, S/C/M/63 (Nov. 11, 2002); Council for Trade in Services, *Note by the Secretariat: Report of the Meeting Held on 28 February 2003*, ¶¶ 8-17, S/C/M/65 (Mar. 21, 2003) [hereinafter *Council Report February*]; Council for Trade in Services, *Note by the Secretariat: Report of the Meeting Held on 14 May 2003*, ¶¶ 21-42, S/C/M/66 (June 18, 2003) [hereinafter *Council Report May*].

87. *Council Report February*, *supra* note 86, ¶ 8.

88. *Id.*

89. *Id.* ¶ 9.

90. *Id.* ¶ 15; see also Council for Trade in Services, *Communication from Switzerland: Consideration of Issues Relating to Article XX:2 of the GATS*, ¶ 19, S/C/W/237 (Nov. 27, 2003) (arguing that this approach is the only one that never shows any internal inconsistency).

91. *Council Report May*, *supra* note 86, ¶ 22.

92. *Id.*

93. *Id.* ¶¶ 23-24.

94. *Id.* ¶ 25.

1. *Approach 1*

Some would argue that the best way to approach the overlap issue is to separate the scope of GATS Articles XVI and XVII and make them “mutually exclusive.”⁹⁵ This approach could be divided into two sub-approaches: Approach 1.1 and Approach 1.2.

Approach 1.1 is that the overlap areas should be allocated to the market access column.⁹⁶ Under this approach, GATS Article XVI would cover all measures referred to under paragraphs 2(a) to (f) of Article XVI, no matter whether they were discriminatory or non-discriminatory.⁹⁷ Thus, Article XVI would become the *lex specialis*.⁹⁸ A typical example for this purpose is as follows:

Under the situation of an Unbound in Market access and a None in National Treatment, any of the six types of limitations could be introduced, regardless of whether in non-discriminatory or discriminatory form. In the inverse situation where a commitment existed in the Market Access column, with an Unbound in the national treatment column, the Member would not be permitted to introduce any discriminatory market access type measures.⁹⁹

Approach 1.2 is that the overlap areas should be allocated to the national treatment column.¹⁰⁰ Under this sub-approach, Article XVI covers only non-discriminatory measures, while Article XVII covers discriminatory measures. A typical example for the purpose is as follows:

In case of an Unbound in market access and a commitment in national treatment, the Member would only be permitted to take market access measures in their non-discriminatory form. If the Unbound existed in the national treatment column, with a None under market access, the Member would be free to introduce any discriminatory measure, including any of those measures mentioned in Article XVI:2(a)-(f) in their discriminatory form.¹⁰¹

2. *Approach 2*

Another approach is to establish a priority between the unbound entry and the bound entry containing specific commitments.¹⁰² This approach can also be divided into two sub-approaches: Approach 2.1 and Approach 2.2.

According to Approach 2.1, the unbound entry prevails over the bound entry containing specific commitments.¹⁰³ A typical example for this purpose is as follows:

95. Julian Arkell, *The General Agreement on Trade in Services: A Review of Its Textual Clarity and Consistency*, 27 GENEVA PAPERS ON RISKS & INS. 337, 346 (2002).

96. Council for Trade in Services, *Note by the Chairman: Consideration of Issues Relating to Article XX:2 of the GATS*, ¶ 16, S/C/W/237 (Nov. 20, 2003).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* ¶ 17.

101. *Id.*

102. *Id.* ¶¶ 18-19.

103. *Id.* ¶ 18.

An Unbound in the market access column with a commitment in national treatment would allow the Member to apply any discriminatory market access limitation . . . [A]n Unbound in national treatment together with a None in the market access column would permit the Member to apply any discriminatory measure, including those falling under Article XVI:2.¹⁰⁴

According to Approach 2.2, the bound entry containing specific commitments prevails over the unbound entry.¹⁰⁵ A typical example for this purpose is as follows:

[A] commitment in the national treatment column, together with an Unbound under market access would allow the Member only to operate measures falling under market access in its non-discriminatory form . . . [A] commitment under market access, and an Unbound under national treatment [would allow] the Member . . . [to] operate market access measures only to the extent scheduled.¹⁰⁶

3. *Approach 3*

The third approach is to merge market access with national treatment and mix the limitations into the national treatment column. As Hoekman argues, the problem is that some quantitative limitations are non-discriminatory and therefore unable to be classified into national treatment limitations,¹⁰⁷ making this way of merger seem unfeasible.

4. *Approach 4*

It is noteworthy that China's service schedule uses a schedule-based approach that tries to avoid the overlap issue by adding special statements to the service schedule, for example, by inscribing "None, except for discriminatory measures falling under Article XV:2" in the national treatment column, or by inscribing "Unbound, except for measures falling also under Article XVII" into the market access column.¹⁰⁸ In the national treatment column of China's service schedule, there are some statements, such as: "Unbound except for the measures referred to in the market access column,"¹⁰⁹ or "[e]xcept for . . . limitations . . . listed in the market access column, foreign financial institution may do business . . . with foreign invested enterprises . . . [o]therwise, none."¹¹⁰ But this "schedule-based" approach can only reduce the overlap issue; it cannot totally resolve it.¹¹¹ The panel

104. *Id.*

105. *Id.* ¶ 19.

106. *Id.*

107. Bernard Hoekman, *Market Access Through Multilateral Agreement: From Goods to Services*, 15 *WORLD ECON.* 707, 720 (1992).

108. *Consideration of Issues Relating to Article XX:2 of the GATS*, *supra* note 56, ¶ 20.

109. Working Party on the Accession of China, *Schedule CLII – The People's Republic of China, Part II – Schedule of Specific Commitments on Services List of Article II MFN Exemptions*, tbl.I, WT/ACC/CHN/49/Add.2 (Oct. 1, 2001).

110. *Id.* tbl.7(B).

111. *Consideration of Issues Relating to Article XX:2 of the GATS*, *supra* note 56, ¶ 20.

report in *China—Certain Measures Affecting Electronic Payment Services*¹¹² provides a good example of the difficulties of the issue.

VII. The WTO Case of China-Electronic Payment Services

In *China—Electronic Payment Services*, one of the issues focused on the overlap between market access and national treatment. China inscribed the term “Unbound” in the market access column, and “None” in the column entitled “Limitations on National Treatment.” The recent WTO panel report on *China—Electronic Payment Services* discussed:

The United States argues that China’s full national treatment commitment implies that measures inconsistent with both Articles XVI and XVII are subject to China’s obligations under Article XVII. China, on the other hand, argues that its absence of market access commitment means that such measures are not subject to any obligations it may have under Article XVII.¹¹³

China argued that “the measures described in Article XVI:2 cannot simultaneously be subject to Article XVII, without wholly disregarding the basis upon which market access and national treatment commitments were scheduled.”¹¹⁴ In China’s view:

Article XX:2 establishes . . . the “order of precedence” . . . in [favor] of Article XVI, as well as the principle of effectiveness of treaty interpretation (*effet utile*) . . . [and] Article XVI governs “all aspects” of the measures described in Article XVI:2(a)-(f), including any respect in which such a measure is potentially discriminatory. Articles XVI and XVII are thus “mutually exclusive” in their respective spheres of application.¹¹⁵

Obviously, China supported the Approach 1.1. The European Union, Japan, Australia, and Ecuador were on China’s side.¹¹⁶

On the contrary, in the view of the United States, “Article XVI:2 . . . does not extend to restrictions that are discriminatory.”¹¹⁷ “For the United States, Article XX:2 does not make Articles XVI and XVII ‘mutually exclusive’ in their respective spheres of application,” so “an ‘Unbound’ inscription for market access, combined with a ‘None’ for national treatment, ‘carves out’ only overall quantitative limitations, not limitations that discriminate against foreign suppliers.”¹¹⁸ Obviously, the United States supported Approach 2.2. Guatemala sided with the United States.¹¹⁹

The panel states that the ordinary meaning of the term “None” “in clear when read in conjunction with the title of this column in which the term appears,” and “the entry of ‘None’ in the national treatment column suggests that China would be committed to pro-

112. Panel Report, *China—Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (July 16, 2012) [hereinafter *China—Electronic Payment Services*].

113. *Id.* ¶ 7.655.

114. *Id.* ¶ 7.646.

115. *Id.*

116. *Id.* ¶ 7.648.

117. *Id.* ¶ 7.647.

118. *Id.*

119. *Id.* ¶ 7.648.

viding full national treatment.”¹²⁰ Because “the term ‘Unbound’ indicate[s] an absence of constraint or obligation . . . China is under no constraint or obligation to grant market access within the terms of Article XVI:2.”¹²¹ The panel “view[ed] Article XX:2 as a further indication that measures within the scope of any of the subparagraphs of Article XVI:2 can have discriminatory aspects.”¹²²

In the panel’s view, the scope of Articles XVI and XVII are not mutually exclusive. Both provisions can apply equally to a single measure.¹²³ The special rule in Article XX:2 provides a simpler requirement: A Member need only make a single inscription of the measure under the market access column, which then provides an implicit limitation under national treatment.¹²⁴ The wording of Article XX:2 indicates that what is inscribed in the market access column is a “measure” that, in the situation of conflict contemplated by Article XX:2, must encompass aspects that are inconsistent with both Articles XVI and XVII.¹²⁵ In this way, a single inscription under Article XVI of a “measure” will provide a limitation as well under Article XVII.¹²⁶

The panel also reasoned that it would be incongruous if an inscription of “Unbound” had an effect different from that of inscribing individually all possible measures within the six categories foreseen under Article XVI:2.¹²⁷ Any other interpretation would elevate form over substance.¹²⁸ Thus, under the panel’s assessment, an inscription of the term “Unbound” in the market access column is, for all purposes, an inscription of “measures” specifically defined by Article XVI:2.¹²⁹ Because a Member may not maintain or adopt these “measures” unless otherwise specified in its schedule, Article XX:2 consequently applies to situations where a Member has inscribed “Unbound” in the market access column of its schedule.¹³⁰ Therefore, China’s inscription of “Unbound” in the market access column of its schedule is the functional equivalent of an inscription of all possible measures falling within Article XVI:2.¹³¹

Articles XVII and XVI both encompass inconsistencies brought by an “Unbound” inscription in the market access column.¹³² As a result, under Article XX:2, the inscription of “Unbound” will “provide a condition or qualification to Article XVII as well,” allowing China to maintain measures that are inconsistent with both Articles XVI and XVII.¹³³ By having an inscription of “Unbound” for subsector (d) in mode one under Article XVI, and a corresponding “None” under Article XVII, China has indicated that it is free to maintain the full range of limitations expressed in the six categories of Article XVI:2, whether discriminatory or not.¹³⁴

120. *Id.* ¶ 7.651.

121. *Id.* ¶ 7.652.

122. *Id.* ¶ 7.654.

123. *See id.*

124. *Id.* ¶ 7.658.

125. *See id.* ¶ 7.655.

126. *Id.* ¶ 7.659.

127. *See id.* ¶ 7.656.

128. *See id.*

129. *See id.*

130. *See id.*

131. *Id.* ¶ 7.660.

132. *See id.* ¶ 7.657.

133. *See id.*

134. *Id.* ¶ 7.661.

The panel found that the obligations in Article XVI:2 can extend to measures that are also within the scope of Article XVII, meaning that China may introduce or maintain any measures falling within Article XVI:2, including those that may be discriminatory within the meaning of Article XVII.¹³⁵ By inscribing "Unbound" under market access, China reserves the right to maintain any type of measure within the six categories falling under Article XVI:2, regardless of its inscription in the national treatment column.¹³⁶ Accordingly, the panel found that China's ability to maintain any measures via its market access entry was inconsistent with Articles XVI and XVII.¹³⁷

The panel also disagreed with China's take on "order of precedence," reasoning that neither Articles XVI nor XVII are subordinate to each other.¹³⁸ Rather, the panel found Article XX:2 provides scheduling primacy for market access column entries.¹³⁹ Therefore, a WTO Member who does not want to make a commitment under Article XVI, discriminatory or non-discriminatory, may do so by inscribing the term "Unbound" in the market access column of its schedule.¹⁴⁰

VIII. Concluding Remarks

Although the panel in *China–Electronic Payment Services* supported China's view on the relationship between "Unbound" market access and "None" national treatment, the panel's approach is different from China's approach. China chose a "mutually exclusive" approach, i.e., Approach 1.1, while the panel said that Article XVI and XVII were not "mutually exclusive." China's view of the "order of precedence" in favor of Article XVI was also rejected by the panel. While it denied a hierarchy between Articles XVI and XVII, the panel did create a "scheduling primacy" for entries in the market access column based on Article XX:2. As a matter of fact, the panel adopted Approach 2.1. Although China and the panel chose different approaches, the final effect was the same. All roads lead to Rome.

China–Electronic Payment Services is the first WTO case touching on the sophisticated issue of the relationship between market access and national treatment under the GATS. This issue will continue unless the WTO Members choose an approach that can totally eliminate the overlap between Articles XVI and XVII, along with the overlap between market access measures and national treatment measures. So far, how to separate market access and national treatment has been a difficult question. It is undisputed that some market access measures are also discriminatory by their nature, so those measures may be inconsistent with both market access obligations and national treatment obligations. How to classify those measures is the key to addressing the issue of Articles XVI and XVII. A simple, arbitrary approach, e.g., "mutually exclusive," or "scheduling primacy" in favor of market access entry, does not seem persuasive. The panel that interpreted the relationship had to rely heavily on inferences and implications. Too many inferences and implications may significantly reduce the credibility of the panel's conclusion on this issue.

135. *Id.* ¶ 7.654.

136. *Id.* ¶ 7.663.

137. *Id.* ¶ 7.665.

138. *See id.* ¶ 7.660.

139. *See id.*

140. *Id.* ¶ 7.664.

The essence of the relationship between market access and national treatment is how far a Member can go under or beyond its current service schedule. Obviously, Approach 1.1 gives a Member too much discretion to introduce new restrictive measures. The effect of Approach 2 depends on the hierarchy between unbound and bound entry. If the unbound entry prevails over the bound, a Member would have extra power to make discriminatory measures. If the bound entry prevails over the unbound, the Member would have no such power. The complicated relationship between market access and national treatment under the GATS is a reflection of the complicated issue of the separation of powers between Members and the WTO, and of the separation of powers between national law and international law, which determines the degree of liberalization of trade in service. The overlap between market access and national treatment under the GATS is a fact, and how to clarify the overlap is more a choice of conservatism or liberalism than a technical problem.

